IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 587

THE CITY OF CRYSTAL LAKE, an Illinois Municipal Corporation,

Petitioner,

VS.

NATIONAL YEAST CORPORATION, formerly NATIONAL GRAIN YEAST CORPORATION, a New Jersey corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 388

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The City of Crystal Lake, an Illinois municipal corporation, respectfully presents this its petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered in the above entitled cause on November 8, 1948, and in which a petition for rehearing was denied on December 7, 1948, and respectfully represents to this Court:

I.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

The fundamental matter involved in this case concerns the power and authority of the United States District Court, by use of an injunction, to extend the term of a written agreement between the National Grain Yeast Corporation, the City of Crystal Lake and Crystal Lake Building Corporation, which agreement was without consideration, was *ultra vires* the powers of the City, had been breached by the Yeast Company during the entire term of the agreement, and by its express terms had expired. There is also involved the jurisdiction of the District Court to entertain this suit because the Crystal Lake Building Corporation, one of the parties to the agreement, was not made a party to the suit, and if it had been made a party there would not have been diversity of citizenship, which was the only ground for bringing the suit in a federal court.

The agreement in question was dated November 10, 1939. By that agreement the City purported to grant to the Yeast Company the free use of the City's storm sewer for disposal of the waste resulting from the manufacture of yeast by the Yeast Company at its yeast plant in the City of Crystal Lake. (R. 19-22.)

The storm sewer was constructed and is maintained by the City through taxation for the sole purpose of providing a means for the discharge of surface waters accumulating on the streets of the City, and is necessarily equipped with open drains with grated coverings, extending from the street down to the storm sewer, through which any obnoxious odors from sewage and industrial waste dis-

charged into the storm sewer would arise and permeate the air, causing great discomfort and annoyance to the residents of the City.

By the agreement, the City purported to *allow* the Yeast Company to connect its waste disposal line to the City's storm sewer. The Yeast Company agreed to install a shut-off valve in its disposal line, and agreed that the City should have free access to that valve and the right to close the valve to prevent the discharge of the effluent (consisting of the waste and cooling water resulting from the manufacture of yeast) into the storm sewer upon certain conditions, such as the storm sewer becoming overloaded by reason of a rain storm, or an excessive flow of the effluent from the Yeast Company's plant or in the event the Illinois Sanitary Water Board should notify the City that the discharge of the effluent into the storm sewer constituted a pollution of the stream into which the storm sewer emptied, or in the event repairs to the storm sewer should be necessary. (R. 19-22.)

By the Sixth paragraph of the agreement, the Yeast Company agreed that "it will treat all of the effluent discharged from its treatment plant, so as to prevent any unpleasant odors from arising at the point where the storm sewer of the City of Crystal Lake discharges into the Crystal Lake outlet". (R. 21.)

By the Seventh paragraph of the agreement, the Yeast Company and the Crystal Lake Building Corporation, "owner of said property", agreed to indemnify the City against any damages it might sustain by reason of any claims filed against the City on account of the Yeast Company discharging its effluent into the storm sewer, and agreed for the life of the agreement not further to encumber the yeast plant. (R. 22.)

Paragraph Eleventh of the agreement is as follows:

> "This agreement shall extend for a period of five (5) years and expire five (5) years from the date hereof, but is subject to renewal, providing conditions are satisfactory to both parties hereto, at the expiration of this agreement." (R. 22.)

Within a few days after the agreement was signed by the parties thereto, the Yeast Company, without treating the waste from its yeast plant so as to remove unpleasant odors from arising therefrom, commenced to discharge the waste into the City's storm sewer (R. 93, 101) and continued to discharge its waste into the storm sewer during the entire five-year term of that agreement (R. 120), notwithstanding the continuous protests of the residents of the city of Crystal Lake and the City Council that the nuisance arising from the obnoxious odors be eliminated. (R. 154, 162-163, 167, 172-173, 184, 190, 194, 201, 205, 210, 178-182.) The evidence in this case is conclusive and uncontradicted, and was admitted by all of the witnesses called by the Yeast Company, including its officers, that the obnoxious odors arising from the discharge of the Yeast Company's waste into the storm sewer continued from the time the waste was first discharged into the storm sewer up to the time, and long after the time, when the five-year term of the agreement of November 10, 1939, expired. (R. 152-177, 183-216, 102, 109-114, 132-133, 222.)

The matter of the obnoxious odors was called to the attention of the Mayor and members of the City Council many times by residents of the City from the time the Yeast Company commenced to discharge its waste into the storm sewer up to and long after the agreement by its terms expired (R. 154, 162-163, 167, 172-173, 184, 190, 194, 201, 205, 210), and resolutions regarding the same were passed at various times by the City Council of Crystal

Lake demanding that the Yeast Company either remedy the situation or cease discharging its waste into the storm sewer. (R. 178-182.) The first of those resolutions was passed on June 15, 1940, less than six months after the Yeast Company had begun to discharge its waste into the storm sewer. Then followed resolutions passed on March 4, 1941, September 15, 1942, October 10, 1942, and July 20, 1943, none of which caused the Yeast Company either to remove the odors from the waste or to cease using the storm sewer.

On December 7, 1943, the City Council adopted a motion that "the City should not renew the contract with the Yeast Company for waste disposal in storm sewer at conclusion of present contract." (R. 181.)

On February 15, 1944, after considering a letter from the Illinois Sanitary Water Board urging the City to reconsider its action of December 7, 1943, a motion was adopted to send the following answer to the Illinois Sanitary Water Board:

> "The City Council has decided that no change shall be made contrary to the decision made on December 7th, 1943." (R. 181.)

Again on April 4, 1944, after considering a letter from the Illinois Sanitary Water Board, and arguments made by a vice-president of the Yeast Company urging a renewal of the agreement, and objections made by residents of Crystal Lake against such renewal, a motion was adopted by the City Council that the City deny the Yeast Company the use of the storm sewer at the expiration of the existing agreement on November 10, 1944. (R. 182.)

On November 3, 1944, the National Grain Yeast Corporation filed its complaint in the District Court to enjoin the City from preventing the discharge of its waste and

cooling water into the storm sewer after the expiration of the agreement of November 10, 1939. (R. 2-16, 19-22.) The District Court denied the Yeast Company's motion for a preliminary injunction. (R. 31-32.) The Yeast Company appealed to the United States Court of Appeals for the Seventh Circuit, and that Court reversed the order of the District Court, and remanded the cause for further proceedings in accordance with the views expressed in the opinion of the Circuit Court of Appeals. In substance the Circuit Court of Appeals held that the Yeast Company was entitled to a renewal of the agreement of November 10, 1939, if it should prove that it diligently and in good faith attempted to comply with its agreement, although it wholly failed to perform one of the most important provisions of the agreement, viz., the agreement by the Yeast Company to treat its waste so as to eliminate unpleasant odors before discharging its waste into the storm sewer. The opinion further said, in effect, that if the Yeast Company was prevented from eliminating the odors, up to the time of the expiration of the agreement, because of lack of co-operation by the City or because of war conditions restricting the use of materials required for the installation of a system which the Yeast Company claimed would remove the odors, then the Yeast Company was entitled to a renewal of the agreement. *National Grain Yeast Corporation* v. *City of Crystal Lake,* 147 Fed. (2d) 711. (A copy of the opinion is set forth as Appendix I following the brief in support of this petition.)

The Circuit Court of Appeals did not, in its opinion, consider the question of *ultra vires* or want of consideration, and did not have before it the volume of undisputed evidence showing the unbearable situation arising from the discharge of the obnoxious waste into the storm sewer, or the innumerable complaints made by the residents of

Crystal Lake to the Mayor and members of the City Council, or the numerous resolutions passed by the City Council demanding that the Yeast Company cease using the storm sewer for the discharge of the waste from its yeast plant. Neither did the Circuit Court of Appeals, in its opinion, even mention the Sixth paragraph of the agreement by which the Yeast Company agreed to treat all of its waste discharged into the storm sewer so as to prevent any unpleasant odors from arising therefrom. Instead, it erroneously stated the issue before the Court as being whether the Yeast Company had done everything within its power to minimize and eradicate the odors incident to the operation of its plant, or whether it had done nothing to abate the nuisance during the existence of the nuisance. Notwithstanding there was no such issue presented, the Circuit Court of Appeals refused, on application by the City for a rehearing, to modify or change its opinion so as to truly set forth the issue presented to that Court, viz., whether the Yeast Company had performed its positive agreement to treat all of the waste discharged into the storm sewer so as to prevent any unpleasant odors from arising therefrom.

After the remandment of the cause to the District Court, the City filed a motion to dismiss the complaint on the ground (1) that the Crystal Lake Building Corporation, an Illinois corporation, was a party to the agreement of November 10, 1939, and therefore was an indispensable party to the suit and it being a citizen of the same state as the defendant, the necessary diversity of citizenship was lacking to give the District Court jurisdiction on that ground; (2) that the contract is *ultra vires* because the City had no authority to permit the discharge of sewage from private sources into the storm sewer; and (3) that the contract shows that there was no consideration to be paid

to the City by the Yeast Company for the use of the storm sewer by the Yeast Company. (R. 47-48.) The motion to dismiss was denied by the District Court. (R. 49.)

The City then filed an answer in which, among other things, it was alleged (1) that the Building Corporation was the owner of the yeast plant and was a party to the agreement of November 10, 1939, but that the Yeast Company had failed to join with it, as plaintiff, the Building Corporation, apparently in an attempt to confer upon the District Court jurisdiction upon the ground of diversity of citizenship, when there was no such diversity of citizenship; (2) that the City refused to renew the agreement because the agreement by its terms had expired and because the Yeast Company had not, prior to November 10, 1944, complied with its express agreement to eliminate all odors arising from the waste in accordance with the agreement; (3) that the agreement of November 10, 1939, had expired and no renewal thereof has been made; and (4) that the Yeast Company never agreed to pay and has not paid, any compensation to the City for the use of the storm sewer. (R. 49-67.)

The Court referred the cause to a Master in Chancery to take the evidence and report to the court his findings of fact and conclusions of law. The Master in his report to the court made certain findings of fact, which were unsupported by any evidence, and reported certain conclusions of law, which were clearly erroneous, and, based thereon recommended that an injunction be issued enjoining the City from interfering in any manner with the discharge of the Yeast Company's cooling water and waste into the storm sewer prior to November 10, 1949. (R. 239-253.)

After overruling the City's objections to the Master's report, the District Court entered a decree approving and confirming the Master's report and granting an injunction

in accordance with the Master's recommendation. (R. 260-263.) From that decree the City appealed to the United States Court of Appeals for the Seventh Circuit, which Court affirmed the decree of the District Court. (A copy of the opinion is set forth as Appendix II following the brief in support of this petition.)

The only matter considered in the opinion of the Circuit Court of Appeals was the question of lack of jurisdiction of the District Court because of the failure of the Yeast Company either to join as a co-plaintiff or to make defendant the Building Corporation as a party to the suit. As to all other questions, such as want of consideration and *ultra vires*, the Circuit Court of Appeals, in its opinion, merely said that they were decided against the City on the former appeal from the order of the District Court denying a preliminary injunction, which is not a fact as shown by the opinion of that Court reported in 147 Fed. (2d) 711.

II.

BASIS FOR JURISDICTION OF THIS COURT.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C-229 (43 Stat. 938; 28 U. S. C. Sec. 347). The judgment of the Circuit Court of Appeals on the merits was entered on November 8, 1948, a petition for rehearing was filed within the time allowed by the rules of said Court, and was denied on December 7, 1948, without opinion. (R. 303-304.) This petition for certiorari is filed within three months from December 7, 1948, and thus wthin the time allowed by the Judicial Code and the rules of this Court.

III.

THE QUESTIONS PRESENTED.

1. Did the United States District Court have jurisdiction of this suit under Section 41, subd. (1) of the Judicial Code on the ground of diversity of citizenship?

(The Crystal Lake Building Corporation, an Illinois Corporation, was a party to the agreement of November 10, 1939, but it was not made a party to this suit. Had it been made a party to this suit, it would have destroyed jurisdiction on the ground of diversity of citizenship.)

2. Could the District Court, by injunction, extend for an additional term of five years an agreement which had expired and which was subject to renewal only if conditions were satisfactory to the parties thereto at the expiration of the agreement?

(The City, not the Yeast Company nor a Federal Court, had the right to decide whether conditions were satisfactory to it at the expiration of the agreement. The City was fully justified in deciding that conditions were not satisfactory to it at the expiration of the agreement because of the discharge of waste by the Yeast Company into the storm sewer during the entire five-year term of the agreement causing sickening and obnoxious odors to arise therefrom and permeate the air of Crystal Lake in violation of the express agreement of the Yeast Company, without any qualification, to treat its waste before discharging it into the storm sewer so as to prevent any such disagreeable odors from arising therefrom.)

3. Could the District Court, by injunction, compel the City to allow the Yeast Company to continue for an additional period of five years, the discharge of its obnoxious and stinking waste into the City's storm sewer?

4. Was the right of the Yeast Company to a renewal of the agreement of November 10, 1939, dependent upon conditions existing at the termination of the agreement of November 10, 1939, or at a time long subsequent thereto after the installation of a new system for treating the waste to remove the odors therefrom?

(The installation of the so-called closed system had not eliminated the obnoxious odors arising from the yeast waste discharged into the storm sewer up to February, 1946, more than a year after the expiration of the agreement of November 10, 1939, and more than a year after this suit was begun and the preliminary injunction was issued herein (R. 152-177, 183-216, 132-133), and the obnoxious odors still arise from the waste discharged into the storm sewer whenever the waste treatment plant is not properly operated or whenever there is a breakdown of equipment or machinery at the waste treatment plant. (R. 133, 135, 224-225.)

5. Could the District Court, by injunction, decree enforcement of an agreement by the City which was *ultra vires* the powers of the City to make?

6. Could the District Court, by injunction, compel the City to perform an agreement which was not based on any consideration to the City?

IV.

REASONS FOR ALLOWANCE OF WRIT.

1. In order to sustain jurisdiction of the District Court on the ground of diversity of citizenship, the Circuit Court of Appeals has erroneously held that the Crystal Lake Building Corporation, an Illinois Corporation, was not an indispensable party to this suit, which in effect was a suit to have the Federal Court adjudge and decree that the

agreement of November 10, 1939, had been, or should have been, renewed for an additional term of five years. The Building Corporation was a party to the agreement, but is not bound by the decree in effect renewing that agreement because it was not made a party to the suit. Had it been made a party to the suit, either as a co-plaintiff or as a co-defendant, there would have been no diversity of citizenship because its interest in the litigation would have been antagonistic to that of the City.

2. The decision of the Circuit Court of Appeals, if allowed to stand, will adversely affect the right of municipalities throughout the United States to restrict or control the use by private corporations of facilities installed by the municipality with public funds, contrary to all rules of law heretofore established.

3. The decision of the Circuit Court of Appeals that the City did not have the absolute right to determine for itself whether conditions were satisfactory to it at the expiration of the agreement of November 10, 1939, and to refuse to renew the agreement on the ground that conditions were not then satisfactory to it, is manifestly wrong.

4. The decision of the Circuit Court of Appeals that the discharge of waste by the Yeast Company into the storm sewer causing obnoxious and sickening odors to arise therefrom and to permeate the air of Crystal Lake, to the great discomfort and annoyance of the residents of the City, during the entire five-year term of the agreement, did not justify the City in its decision that conditions were not satisfactory to the City at the expiration of the agreement of November 10, 1939, is most clearly wrong and contrary to all reason.

5. The Master found and the District Court adopted the finding which was approved by the Circuit Court of Appeals without any comment or discussion, that the contract of November 10, 1939, was based upon good and

valuable consideration on the part of both the Yeast Company and the City, which is contrary to the undisputed evidence in this case that the Yeast Company never paid, nor agreed to pay, anything for the use of the storm sewer for the disposition of its waste. (R. 105, 164, 211.)

6. The Master found, and the District Court adopted the finding which was approved by the Circuit Court of Appeals without any comment or discussion, that the contract of November 10, 1939, was within the power and authority of the City and was not *ultra vires* or void, which is contrary to the statutes and law of the State of Illinois.

7. The Master found, and the finding was adopted by the District Court, and approved by the Circuit Court of Appeals, that continuously from the time of locating its manufacturing plant, the Yeast Company diligently and in good faith sought to eliminate unpleasant odors from the yeast waste discharged into the storm sewer, which is not supported by the evidence.

8. The finding of the Master, which was adopted by the District Court and approved by the Circuit Court of Appeals, that the Yeast Company has carried out and performed each term, provision and condition of the contract with the City, dated November 10, 1939, is contrary to all evidence in this case.

8. The City was not obligated under its agreement with the Yeast Company to co-operate with the Yeast Company to eliminate the odors from the waste discharged into the storm sewer by the Yeast Company. The only duty of the City was to do nothing to *prevent* the Yeast Company from performing its agreement. There is not a scintilla of evidence showing that the City did anything to prevent the Yeast Company from carrying out its agreement to treat its waste so as to prevent any unpleasant odors from arising therefrom; yet the Master found, and the District Court adopted the finding which was approved by the Circuit

Court of Appeals, that the City failed and refused to co-operate with the Yeast Company in its efforts to eliminate odors from the yeast waste discharged into the storm sewer. No facts were shown even tending to prove that the City failed or refused to co-operate with the Yeast Company in its efforts to eliminate the odors. The finding of the Master was based entirely on conclusions of witnesses, unsupported by any facts, that the City failed to co-operate. (R. 10, 79, 82, 95, 98, 99, 229-230.) (Sebastian C. Lutz, the Yeast Company's vice-president, testified: "I don't know of anything in the contract of November 10, 1939, that puts any burden on the City to do anything in connection with the yeast operation in eliminating the odors from the waste." R. 231.)

9. In his report the Master erroneously stated, and that statement was approved by the District Court and the Circuit Court of Appeals, and was necessarily a most important basis for the decree in this case, that "apparently the contract does not bind the plaintiff to an absolute elimination of said odors but does put the burden upon the plaintiff to use its best efforts to eliminate them, entirely if possible". That statement is not justified by the express language of Section Sixth of the so-called contract, by which the Yeast Company agreed to "treat all of the effluent discharged from its treatment plant, so as to prevent any unpleasant odors from arising at the point where the storm sewer of the City of Crystal Lake discharges into the Crystal Lake outlet". It is entirely contrary to the understanding of the attorney who represented the Yeast Company in the negotiations and drafting of the agreement, who testified that "Paragraph 6 of the agreement constitutes an affirmative undertaking by the National Grain Yeast Corporation to so treat its waste at its own expense as to destroy unpleasant odors arising from disposition of the waste into the storm sewers". (R. 118.)

It also destroys the purpose of limiting the agreement to a term of five years with the right of renewal for an additional five years if conditions should be satisfactory to both parties at the expiration of the agreement, because in the negotiations, when the attorney for the Yeast Company objected to limiting the agreement to an original term of five years, the Mayor told the attorney for the Yeast Company, according to that attorney's testimony, that the City had put in the five-year clause, and to extend it for an additional five years, because the City wanted to be sure that the Yeast Company's operation there would not have odors, which had caused a lot of difficulty in the City and complaints by the people who were living there. (R. 115.)

10. The Master found, and the District Court adopted the finding which was approved by the Circuit Court of Appeals in accordance with its opinion rendered upon the appeal from the order of the District Court denying a temporary injunction, that if World War II prevented a party from complying with his agreement, then he is relieved from such non-compliance. Such is not the law when the party in default is attempting to enforce compliance with the contract against the other not in default.

Wherefore petitioner, The City of Crystal Lake, prays the issuance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court in the above entitled case.

Respectfully submitted,

THE CITY OF CRYSTAL LAKE,
Petitioner,

By HOMER D. DINES,
JOSEPH A. CONERTY,
DONOVAN Y. ERICKSON,
Its Attorneys.

DAILY, DINES, WHITE & FIEDLER,
Of Counsel.

IN THE

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The City of Crystal Lake, an Illinois Municipal Corporation, *Petitioner and Appellant Below,* *vs.* National Yeast Corporation, formerly National Grain Yeast Corporation, a New Jersey Corporation, *Respondent and Appellee Below.*	No. .....

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The District Court did not deliver any opinion in this case.

The Circuit Court of Appeals for the Seventh Circuit delivered an opinion when it reversed the order of the District Court denying a preliminary injunction, which opinion is reported in 147 F. (2d) 711, and a copy of which is set forth as Appendix I following this brief.

The opinion of the Circuit Court of Appeals affirming the decree of the District Court awarding a permanent injunction herein has not yet been reported, but appears at pages 296-302 of the record herein, and a copy of that opinion is set forth as Appendix II following this brief.

No other opinion was delivered by the Circuit Court of Appeals in this case.

II.

JURISDICTION OF THIS COURT.

A statement particularly disclosing the grounds on which the jurisdiction of this Court is invoked is set out in the Petition for the Writ of Certiorari at page 9.

III.

STATEMENT OF THE CASE.

A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, is set forth on pages 2 to 9 of the Petition for the Writ of Certiorari, and for brevity is not here repeated.

IV.

SPECIFICATION OF ERRORS.

In support and amplification of the reasons relied upon for the allowance of the writ, as set forth on pages 11 to 15 of the Petition for Writ of Certiorari, it is the contention of the petitioner that the Circuit Court of Appeals erred in the following respects:

1. In holding that the Crystal Lake Building Corporation was not an indispensable party to this suit, and that, therefore, the necessary diversity of citizenship existed to give the District Court jurisdiction of this suit.

2. In holding, by affirming the decree of the District Court, that the District Court, by injunction, could extend for an additional term of five years an agreement which had expired and which was subject to renewal only if

conditions were satisfactory to all of the parties thereto at the expiration of the agreement.

3. In holding, by affirming the decree of the District Court that the City did not have the right to determine whether conditions were satisfactory to it at the expiration of the agreement of November 10, 1939, and to refuse to renew the agreement on the ground that conditions were not then satisfactory to it.

4. In holding, by affirming the decree of the District Court, that the discharge of waste by the Yeast Company into the storm sewer causing obnoxious and sickening odors to arise therefrom and permeate the air of the City during the entire five-year term of the agreement, did not justify the City in refusing to renew the agreement for an additional period of five years.

5. In holding, by affirming the decree of the District Court, that the right of the Yeast Company to a renewal of the agreement was not dependent upon conditions existing at the termination, but was to be determined upon the conditions existing a long time after the termination of the agreement and after the institution of this suit, when, by reason of the installation of a new system for treating the waste, the Yeast Company succeeded in removing the odors arising from the discharge of its waste into the storm sewer except when there was a breakdown of the new system or a failure to operate it properly.

6. In holding, by affirming the decree of the District Court, that the agreement of November 10, 1939, did not bind the Yeast Company to an absolute elimination of odors from the waste discharged by it into the storm sewer, but only required the Yeast Company to use its best efforts to eliminate such odors.

7. In holding, by affirming the decree of the District Court, but without any discussion, that the agreement of

November 10, 1939, and in particular the agreement for renewal, was not *ultra vires* the powers of the City to make.

8. In holding, by affirming the decree of the District Court, but without any discussion, that the agreement of November 10, 1939, was based upon good and valuable consideration on the part of both the Yeast Company and the City.

9. In holding, by affirming the decree of the District Court, that the City was not justified in refusing to renew the agreement of November 10, 1939, on the ground that conditions were not satisfactory to it because of the obnoxious odors arising from the waste discharged into the storm sewer by the Yeast Company during the entire term of the agreement, if World War II impeded or prevented the Yeast Company from obtaining materials for the construction and completion of its so-called closed system on or before the expiration of the agreement.

V.

ARGUMENT.

THE NECESSARY DIVERSITY OF CITIZENSHIP WAS LACKING TO GIVE THE DISTRICT COURT JURISDICTION.

The Crystal Lake Building Corporation, an Illinois Corporation, was a party to the agreement of November 10, 1939, which, by the decree of the District Court, was, as against the City and in favor of the Yeast Company alone, renewed for an additional term of five years upon the theory that the City was required to enter into such a renewal of agreement by reason of the provisions of the Eleventh section of the agreement of November 10, 1939, that the agreement was "subject to renewal, providing conditions are satisfactory to both parties hereto, at the expiration of this agreement". Manifestly the term "both parties" meant the Yeast Company and the Building Corporation as one party and the City as the other party.

At the time the agreement was made, the Building Corporation was the owner of the Yeast plant. It agreed to indemnify the City against any damages the City might sustain by reason of any claims filed against the City on account of the Yeast Company discharging its effluent into the storm sewer and further agreed for the life of the agreement not further to encumber its plant. (R. 22.) The Building Corporation continued to hold title to the Yeast plant until October, 1944 (R. 105), only a few days before this suit was brought, when it transferred the title to the Yeast Company for the very obvious purpose of an attempt to confer jurisdiction on the federal Court in a

suit by the Yeast Company alone on the ground of diversity of citizenship, which would not have existed if the Building Corporation had been made a party, either plaintiff or defendant, as its interest would have been antagonistic to that of the City.

It is manifest that the Building Corporation was an indispensable party to this suit.

When a final decree cannot be entered in a suit without affecting the interest of a party to an agreement, such party is an indispensable party to such suit. *Shields* v. *Barrow*, 17 How. 130, 139-140; *Shell Development Co.* v. *Universal Oil Products Co.*, 157 Fed. (2d) 421, 424.

When jurisdiction is founded on diversity of citizenship, it must be shown that all persons on one side of the case are citizens of different states from all persons on the other side. *Strawridge* v. *Curtis*, 3 Cranch 267; *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69; *Thomson* v. *Butler*, 136 Fed. (2d) 644, 647.

The omission of a necessary party, who cannot be made a party without defeating the jurisdiction of the court, requires a dismissal of the cause. *Shields* v. *Barrow*, 17 How. 130, 140-142; *Evans* v. *Gorman*, 115 Fed. 399, 404; *Thomson* v. *Butler*, 136 Fed. (2d) 644, 646-647.

When arrangement of parties is merely a contrivance between friends for the purpose of founding jurisdiction on diverse citizenship in a Federal Court, which otherwise would not exist, the device cannot be allowed to succeed. *City of Dawson* v. *Columbia Avenue Savings Fund, Safe Deposit, Title and Trust Company*, 197 U. S. 178, 181.

If a corporation has any corporate existence separate from that of the complainant, it is an indispensable party if a final decree cannot be made without affecting its interest and leaving the controversy in a condition wholly

inconsistent with that equity which seeks to put an end to litigation by doing complete and final justice. *Niles-Bement-Pond Company* v. *Iron Moulders Union Local No. 68 et al.*, 254 U. S. 77, 81.

1.

THE CITY HAD THE RIGHT TO DETERMINE WHETHER, UPON THE EXPIRATION OF THE AGREEMENT OF NOVEMBER 10, 1939, CONDITIONS WERE SATISFACTORY TO IT WITH REFERENCE TO A RENEWAL OF THE AGREEMENT ALLOWING THE YEAST COMPANY TO CONTINUE TO DISCHARGE ITS WASTE AND COOLING WATER INTO THE STORM SEWER FOR AN ADDITIONAL PERIOD OF FIVE YEARS.

This is not a suit against the City under a contract by the City to pay for work done or service performed by the plaintiff. In such a case, as shown by the authorities cited by the Circuit Court of Appeals in its first opinion (147 F. (2d) 711), where the agreement provides that the work is to be done or the service performed to the satisfaction of the one for whom such work or service is to be performed or rendered, he cannot arbitrarily refuse to pay therefor on the ground that the work or service was not satisfactory to him if a reasonable man should have been satisfied with it. Obviously, in a suit to compel the renewal of an agreement, which renewal is to be made only if conditions are satisfactory, either party has the right to refuse to renew the agreement on any ground, with reference to any conditions, which he may deem unsatisfactory, and no court has the right to substitute its judgment for that of such party as to whether conditions were or should have been satisfactory to such party.

However, the evidence in this case is conclusive that the City was fully justified in its refusal to renew the agreement on the ground that conditions were not satisfactory to it at the expiration of the agreement of November 10, 1939. The Yeast Company had, during the entire term of the agreement, and was, at the time of the expiration of the agreement, discharging into the storm sewer waste from its Yeast plant from which arose most obnoxious and sickening odors which permeated the air of the City. That was in violation of the agreement, and it certainly cannot be said, with reason, that those conditions should have been satisfactory to the City because the Yeast Company had endeavored to remove the odors but was unable to do so because (1) when it first began to discharge the waste into the storm sewer there was no known method for removing the same, and (2) because of restrictions on the use of critical material arising from World War II it had not been able to install equipment which would have removed the obnoxious odors.

Those excuses have no bearing on the question whether conditions were, or should have been, satisfactory to the City at the expiration of the agreement of November 10, 1939.

2.

THE RIGHT OF THE YEAST COMPANY, IF ANY, TO RENEWAL OF THE AGREEMENT MUST BE DETERMINED AS OF NOVEMBER 10, 1944.

The express terms of the agreement, without qualification, were that the agreement was subject to renewal, "providing conditions are satisfactory to both parties hereto, at the expiration of this agreement." The Master's 18th finding of fact that "the plaintiff has eliminated

all unpleasant odors from the effluent arising from its manufacture of yeast," (R. 245), and his 21st finding of fact that "the manufacture of yeast by the plaintiff and disposal of the effluent therefrom is not now creating a public nuisance in the City of Crystal Lake," (R. 245), very evidently led him to recommend the issuance of the injunction herein.

Section Eleventh of the agreement expressly provided that the agreement would expire five years from the date thereof, but would be subject to renewal providing conditions were satisfactory to both parties at the expiration of that agreement—not more than a year thereafter. That the Master considered that the agreement was renewable only at the expiration of the agreement of November 10, 1939, is apparent from his recommendation, which was adopted by the District Court, that the City should be enjoined from preventing the discharge of the waste into the storm sewer until November 10, 1949, being five years after the expiration of the agreement of November 10, 1939.

3.

THE AGREEMENT UPON WHICH THIS SUIT WAS BASED WAS *ULTRA VIRES* THE POWERS OF THE CITY.

Irrespective of the rule that a City cannot grant to an individual or private corporation the right to discharge into its storm sewer waste from which obnoxious odors will escape through the storm water openings and permeate the air of the City to the great discomfort of its residents, it is an universal rule of law that no action taken by a city council in the exercise of governmental powers is binding upon its successors. When the agreement of November 10, 1939 expired there was a different mayor and dif-

ferent members of the City Council than those holding office when that agreement was made. (R. 158, 177, 179, 182.) No agreement made or authorized by the Mayor and City Council in 1939 with reference to the use of the storm sewer by a private corporation could be binding upon the new mayor and new City Council on November 10, 1944.

The hands of successors cannot be tied by contracts relating to governmental functions. McQuillan Municipal Corporation (2nd ed.) vol. 3, Sec. 1356, p. 1282; *Illinois Trust & Savings Bank* v. *City of Arkansas City,* 76 Fed. 271, 282; *Omaha Water Co.* v. *City of Omaha,* 147 Fed. 1, 5; *Griffin* v. *Oklohoma Natural Gas Corporation,* 37 Fed. (2d) 545, 548; *Illinois Power & Light Corporation* v. *City of Centralia,* 11 Fed. Supp. 874, 885; *Trustees of the Illinois Central Hospital for the Insane* v. *City of Jacksonville,* 61 Ill. App. 199, 202.

Therefore, the City Council, as it existed at the expiration of the agreement on November 10, 1944, was not bound by that contract to renew, or authorize the renewal, of the agreement for an additional period of five years.

The regulation of the use of a storm sewer is a governmental power. Sections 1, 35 and 36 of Article 23 of the Illinois Cities and Villages Act (Illinois Revised Statutes, 1943, State Bar Association ed., pp. 406, 408, and Sections 1 and 7 of Article 60 of the same act, pp. 448, 449). The City is not engaged in a business enterprise in the installation and use of a storm sewer, the purpose of which is to provide a means for the discharge of rain water from the streets of the City, and not for the discharge of waste from industrial plants.

4.

THERE WAS NO CONSIDERATION FOR THE ALLEGED AGREEMENT BY THE CITY TO RENEW THE AGREEMENT OF NOVEMBER 10, 1939.

The agreement did not provide for the payment of any consideration by the Yeast Company for the use of the storm sewer. Lutz, the Yeast Company's Vice President, testified that the Yeast Company does not pay anything for the use of the storm sewer, and that "we have never paid anything." (R. 105.) Mayor Krause also testified that the Yeast Company does not pay anything to the City for the use of the storm sewer (R. 164) and the testimony of Alderman Meier is to the same effect. (R. 211.)

Notwithstanding that undisputed evidence, the Master found (R. 244), and the finding was adopted by the District Court and approved by the Circuit Court of Appeals, that the agreement of November 10, 1939, was based upon good and valuable consideration on the part of both the Yeast Company and the City.

The Yeast Company did not acquire and equip its plant as the result of any agreement with, or promise by, the City that the Yeast Company could use the storm sewer for the discharge of its waste or sewage. It was not until long after the Yeast Company had acquired and equipped its plant at a cost of $200,000 (R. 76, 90), that it conceived the idea of using the storm sewer for the discharge of its cooling water and sewage. (R. 91-92.) Thus it appears from the undisputed evidence of the Vice-President of the Yeast Company that the Yeast Company did not acquire and equip its plant as the result of any promise or agreement by the City or any of its officers that the Yeast Company might or could use the storm sewer as a means for the discharge of its waste.

5.

THE FACT THAT WORLD WAR II MAY HAVE IMPEDED THE YEAST COMPANY IN ITS CONSTRUCTION OF THE SO-CALLED CLOSED SYSTEM IS NO EXCUSE FOR ITS FAILURE TO COMPLY WITH THE AGREEMENT OF NOVEMBER 10, 1939.

This is not a suit against the City brought on account of *its* failure to perform an agreement, but is brought by the Yeast Company upon a contract to enforce compliance therewith by the City notwithstanding the Yeast Company failed to perform its part of the agreement.

The established law is that if one *is sued* on account of his failure to perform a contract, he may defend on the ground that performance was prevented by war conditions or acts of the Government in the prosecution of the war; but if one *sues* upon a contract requiring performance by him, before he is entitled to the relief sought he must show performance on his part and will not be permitted to set up that he was prevented from performing the contract by war conditions or acts of the Government in the prosecution of the war. *Prescott & Co.* v. *J. B. Powles & Co.,* 193 Pac. 680; *Remy* v. *Alds,* 240 Pac. 216, 218; *Brooke Tool Manufacturing Company* v. *Hydraulic Gears Company,* 89 L. J. K. B. N. S. 263; 9 A. L. R. 1507; *Felder* v. *Oldham,* 199 Ga. 820; 35 S. E. (2d) 497, 164 A. L. R. 415.

The case last cited was decided in October, 1945, and, in principle, is identical with our case.

However, cases which consider the right of a party to recover or escape liability for failure to perform a contract on account of a war have no application to this case, where the agreement provided that the agreement was subject to renewal if conditions were satisfactory to both

parties. If conditions were unsatisfactory to the City upon the expiration of the agreement of November 10, 1939, for any reason or from whatever cause, it certainly had the right to refuse to renew the agreement for an additional period of five years.

On account of the manifestly erroneous, inequitable and unjust decision of the Circuit Court of Appeals, affirming the decree of the District Court, which was based upon facts wholly unsupported by the evidence and conclusions of law which are clearly erroneous, we ask this Court to grant the petition for certiorari herein and to consider and decide the questions involved herein.

Respectfully submitted,

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Of Counsel for Petitioner.

February 16, 1949.

APPENDIX I.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 8730. OCTOBER TERM, 1944, JANUARY SESSION, 1945.

NATIONAL GRAIN YEAST CORPORATION, a Corporation of New Jersey, *Plaintiff-Appellant*,

vs.

THE CITY OF CRYSTAL LAKE, a Municipal Corporation of Illinois, *Defendant-Appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

March 1, 1945.

Before EVANS and MAJOR, *Circuit Judges*, and BRIGGLE, *District Judge.*

EVANS, *Circuit Judge.* We are here reviewing an order which vacated a previously entered temporary restraining order and which also denied plaintiff's application for a preliminary injunction, in a suit brought to restrain defendant from shutting off its storm sewers and thus prevent plaintiff from operating its plant which requires an outlet for waste waters used in its process of yeast making.

Briefly stated, this is the story: Plaintiff filed a verified complaint upon which a restraining order was entered after defendant had filed an affidavit made by its mayor. No answer was filed by the defendant. A temporary restraining order was entered. After oral argument the court made findings without further evidence and refused findings pro-

posed by plaintiff. It then entered an order vacating the restraining order, and refusing plaintiff's motion for a temporary injunction. This appeal followed.

The Facts. Plaintiff is a New Jersey company which manufactures bakers yeast. In 1938 it decided to locate a branch factory in the west and in the vicinity of Chicago because the perishable nature of yeast made its shipment from the east impracticable, save in expensive refrigerator cars. It selected an existing, unused dairy plant in the city of Crystal Lake and entered into negotiations with the officials of that city in regard to its selection of a situs. It represented that it would employ 35 to 40 persons permanently, and it would spend a substantial sum of money in the city when it began operations.

Plaintiff invested $200,000 in its Crystal Lake plant and equipment, and the equipment is unfit for use in any other type of business.

In the process of making yeast, heat is generated which must be overcome. Water is used as the cooling agent. There is also waste water in the process, which has an objectionable odor. It is over the presence of this objectionable odor and its elimination that differences arise. This problem was made known to defendant before plaintiff located at Crystal Lake. In the treatment of this waste, plaintiff first utilized at defendant's suggestion, several lagoons located on a seven acre tract outside the city. They proved inadequate, so, under a contract with the city, it discharged the cooling, and waste, waters into the storm sewers of the city.

The contract, first negotiated in January, 1939, was reexecuted, November 10, 1939, for a term of five years. The renewal provision, paragraph 11, is the covenant of major importance in this controversy. It provided:

> "This Agreement shall extend for a period of five years, and expire five years from the date hereof, but is subject to renewal, *providing conditions are satisfactory to both parties hereto, at the expiration of this Agreement.*"

The City Council, by resolution, has declared that the odors are a nuisance, and that conditions have been unsatisfactory since the beginning of the contract, and that plaintiff has done nothing to abate the nuisance during the existence of the contract.

Plaintiff paints a different picture of the situation and attempts to avoid any culpability. It insists it has done everything within its power to minimize and eradicate the odors incident to the operation of its plant. Its complaint states:

(1) It hired, in November, 1938, two bacteriologists who were authorities on the treatment of industrial waste. It constructed a small plant for use in their experimentations, and plaintiff excavated two large lagoons on a tract of land outside the city. This cost plaintiff large sums of money.

(2) The wastes were treated before being discharged into the storm sewer; the waste thus treated at all times met the purification standards of the Sanitary Water Board of the State of Illinois.

(3) That defendant knew, at the time the contract was made, that science had not perfected a means for entirely eliminating the odor.

(4) On the advice of experts whom plaintiff consulted, it built a "trickling filter" and improvements thereon.

(5) In the course of its research it came upon a so-called closed system, a new and more modern method of removing odor, consisting of two large closed concrete tanks technically called anaerobic digesters; that the construction of such tanks and the apparatus used in connection therewith required a large quantity of steel and materials critical in the war effort.

(6) Plaintiff informed defendant of this new system and its belief that the apparatus would completely dispel the objectionable odors, but defendant, nevertheless, thereafter called a meeting of its Council and passed a resolution whereby it refused to renew its contract "in any event." "That such action by the City embarrassed and *greatly impeded* the plaintiff and prevented it from procuring the

approval which the plaintiff could otherwise have obtained, of the Sanitary Water Board of the State of Illinois, for the installation of such closed system, and from obtaining priorities from the War Production Board * * * for critical materials required for the installation of such closed system."

(7) Plaintiff received notice "from the War Food Administration * * * that it would not recommend approval of Plaintiff's priority, without submitting evidence from the proper officials of the City of Crystal Lake, disclosing that it would permit the plaintiff to operate after the installation of such equipment."

(8) The city and the Sanitary Board later did join* in requesting the issuance of the priorities, but the reply of the Federal authorities was "that the problem of the plaintiff was not, in the opinion of the Administration, of sufficient magnitude to warrant the use, *at said time,* of the materials sought in the application."

(9) Plaintiff then requested Washington officials to confer with the city officials, to urge the defendant to permit the plaintiff to continue to use existing facilities until the end of the war, but defendant refused the request thus made.

(10) Plaintiff received the approval of its priority application in July, 1944, with the limitation that it must be made use of prior to October 31, 1944. Plaintiff at once proceeded with bids for the work and was ready to accept them and proceeded with the construction of the closed system, which would take five months, when "Defendant re-

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* The Mayor of Crystal Lake wrote this letter to the War Food Administration, May 11, 1944.

"The National Grain Yeast Corporation, with a plant at Crystal Lake, is contemplating the building of a disposal plant to treat their waste materials, and to produce an effluent which will be non-odorous.

"While there has been some complaint in the past relative to the offensive odor, it is believed that the proposed treatment plant will eliminate all trouble and the City is willing, and anxious, to cooperate with the yeast corporation in this matter.

"In view of the above it is requested that The National Grain Yeast Corporation be granted the necessary priorities, and release of materials, for the proposed treatment plant.

"Trusting this request will receive favorable action, I am

"Very truly yours, * *"

fused to permit Plaintiff to have said time so required to proceed with the construction and to complete the same, and notified the Plaintiff that it was prepared to, and would, close the shut-off valve at the effluent outlet line on November 10, 1944 and would not extend said time; that, as a result of such action, the Plaintiff was not able to proceed to install and complete such closed system as it otherwise would have been able to do; that had the Plaintiff not been prevented by the war conditions and by the action of the Defendant, it would have, prior to November 10, 1944 performed all 'conditions' satisfactory to the Defendant within the provision of Paragraph Eleventh * * *." Plaintiff is manufacturing a product essential to the war effort.

Ordinarily, the district court's action on an application for a temporary injunction is well-nigh final. It will be modified or vacated only when it appears there was an abuse of discretion. (*U. S.* v. *Corrick*, 298 U. S. 435.) However, in this appeal, since the trial court's action was based solely upon the verified complaint and an opposing affidavit, and no oral evidence was offered, we are in the same position as was the district court. Even so, we are, in a sense reviewing the exercise of the trial court's discretion.

We are convinced from the record before us that plaintiff did not "wholly fail to treat all of the effluent discharged from its treatment plant so as to prevent any unpleasant odors from arising." It must be, and is, assumed, that there are odors and they are obnoxious. As such, they constitute a "condition unsatisfactory" to the City, which would ordinarily justify it in refusing to renew the contract with plaintiff. Also, we must accept the showing that *plaintiff tried to overcome the condition and was hindered in its effort by the defendant.**

Were we looking at paragraph 11 of the contract, disassociated from the circumstances of this case, we might agree that a contract "subject to renewal, providing conditions are satisfactory to both parties hereto" was an unfortunate trouble-provoking clause. At least the word

*_Cheney_ v. _Libby_, 134 U. S. 68; _Van Buren_ v. _Digges_, 11 How. 461; _Williams_ v. _Bank of U. S._, 2 Pet. 96; _Bank of Col._ v. _Hagner_, 1 Pet. 455.

"satisfactory" offers a basis for dispute, and doubtless gave defendant the impression that its right to refuse renewal existed regardless of the reasons (or the prejudices) behind it.

Whether "the satisfaction" is to be judged by the promisee's standards, or by the standards of reasonableness, often depends upon the nature of the subject of the contract—such as a portrait, or, on the other hand, the construction of a building. For cases involving the application of the standard of *reasonableness* of satisfaction as opposed to arbitrariness, see *Erickson* v. *Ward,* 266 Ill. 259, and *Keeler* v. *Clifford,* 165 Ill. 544. In the former case it was said:

"Where a building contract provides for the construction of a building according to certain plans and specifications prepared by the owner's architect, in a good, workmanlike and substantial manner, 'to the satisfaction' means a satisfaction reasonably, and not merely arbitrarily, exercised."

In the latter case, it was said:

"* * * where a contract is required to be done, to the satisfaction of one of the parties, the meaning necessarily is, that it must be done in a manner satisfactory to the mind of a reasonable man; the plain construction of the contract in this regard is, that the work was to be completed in accordance with the contract, in such a manner that appellant, as a reasonable man, ought to be satisfied with it."

Williston on Contracts, Sec. 675 A, states the rule thus:

"Where a promise is conditional, expressly or impliedly, on his own satisfaction, he must give fair consideration to the matter. A refusal to examine the promisor's performance, or a rejection of it, not in reality based on its unsatisfactory nature but on fictitious grounds or none at all, will amount to prevention of the condition and excuse it. * * * Frequently, no doubt, on a true interpretation of provisions for satisfactory performance, reasonable satisfaction, * * * of the promisee is all that is required."

Here we have several persuasive factors which give strength to plaintiff's contention in favor of its right to renewal: (1) Plaintiff invested $200,000 on the assumption that it was going to continue indefinitely in business; (2) Defendant before the execution of the contract was cognizant of the problem of odors in the manufacture of yeast, and suggested the possible use of the existing lagoons as a means of elimination of the odors; (3) Defendant wanted the financial benefit which the location of the plant in the City would give it, and encouraged, if it did not induce, the plaintiff to locate there; (4) Plaintiff tried repeatedly to eliminate the odors by scientific research, at great expense to itself.

We base our conclusion that plaintiff should be given a temporary injunction largely on defendant's refusal to cooperate with plaintiff. By so doing, it defeated the adoption of the newly discovered method of entirely eliminating the objectionable odors. This refusal to cooperate was arbitrary and bordered on bad faith. It precludes defendant, at least so far as this ruling on this temporary injunction is concerned, from a reliance on noncompliance with a required condition of the contract.

The right to renewal was predicated upon a mutual continuance of satisfactory conditions—but if one side was unable to render conditions satisfactory because of the action of the other party, unsupported by reason, the latter should not be permitted to offer the nonperformance of the adversary as a basis for non-renewal.

Our conclusion is based on the showing at this early stage of the litigation. There is necessity for proof in support of the respective assertions to determine final disposition of the suit. But, in the meantime, there is on the one side, real destruction of property, if the injunction be denied while there is no insufferable loss or damage if plaintiff be permitted to continue making bakers yeast—a product found essential to the war effort. Should the actual proof disclose bad faith on the part of the plaintiff, lack of sincere effort to comply with contract provision re-

quiring treatment of the odorous wastes, then defendant's refusal to renew the contract will be sustained.

At this stage of the litigation, however, we cannot say, on the incomplete record before us, that plaintiff failed to make the required effort to successfully treat its waste. Rather, there is ample allegation of the numerous endeavors it made to eliminate the odor, and of defendant's lack of cooperation in procuring installation of a process which promised complete, or nearly complete, eradication of the odor.

In reaching this conclusion, we, holding court in Chicago, are aware that life in a large city is accompanied by more noise, more dirt and more odor than we like. We are justified in our efforts to lessen them, just as the citizens and officers of Crystal Lake are justified in their efforts to remove obstacles to health and enjoyable living. This worthy desire, however, is not strengthened in the opinion of neutrals by angry efforts which defeat rather than promote their objective. Nor can the court, nor should the defendant, ignore the effect of the World War on efforts of parties to comply with contract obligations and requirements.

The extent to which parties may justifiably expect relief in a court of equity upon a showing that the failure to perform was because of inability to secure priorities, etc. due to the War, presents a question upon which final judicial pronouncement has not been made. (See 152 A. L. R. 1447; 151 A. L. R. 1447; 150 A. L. R. 1413; 149 A. L. R. 1447; 148 A. L. R. 1382; 147 A. L. R. 1273; 137 A L. R. 1199.)

It is our belief that courts of equity will not close the door of relief to a party who has diligently and in good faith attempted to complete its contract but who has been wholly or in part prevented from so doing because of the first demands and requirements of the Government in the prosecution of the War.

Plaintiff's obligation in the case before us is of this character.

The order of the District Court is Reversed with directions to proceed in accordance with the views here expressed.

APPENDIX II.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, OCTOBER SESSION, 1948.

No. 9631

NATIONAL YEAST CORPORATION, formerly NATIONAL GRAIN YEAST CORPORATION, a corporation of New Jersey,
Plaintiff-Appellee.

vs.

THE CITY OF CRYSTAL LAKE,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

November 8, 1948.

Before SPARKS and MAJOR, *Circuit Judges,* and BRIGGLE, *District Judge.*

BRIGGLE, *D. J.* Plaintiff-appellee is engaged in the manufacture of baker's yeast in the City of Crystal Lake, Illinois. By virtue of a contract entered into on November 10, 1939, between the Yeast Company and the City, expiring five years from the date thereof, plaintiff discharged its waste into the storm sewers of the city and continues to do so regardless of the expiration date of the contract. The District Court has awarded the plaintiff an injunction restraining the defendant from closing the shut-off valve in the plaintiff's effluent line between its plant and the storm sewer of the city, and from interfering in any manner with the discharge of the plain-

tiff's waste into such storm sewer prior to November 10, 1949, except under the special circumstances provided for in the contract. This on the theory that the City acted arbitrarily and unreasonably in its refusal to give effect to a proviso of the contract making it subject to renewal for a further term of five years "providing conditions are satisfactory to both parties." The lower court held that plaintiff's delay in the treatment of its effluent so as to eliminate offensive odors, as provided in the contract, was to be excused on account of the war and the non-cooperative conduct of defendant.

This case was before us in March, 1945 (Reported in 147 Fed. 2d 711) on an appeal from a refusal of the District Court to grant plaintiff a temporary injunction. For a further statement of the facts reference is made thereto. The decision of the District Court had at that time been made upon the pleadings and an affidavit submitted by defendant, and after a consideration of the facts as disclosed by the pleadings and the affidavit we reversed the decision of the District Court and remanded the cause for a full hearing upon the evidence.

Upon remandment an amended complaint was filed bringing the allegations of fact to date, and the defendant then challenged, for the first time, the jurisdiction of the Court. This challenge was based upon the assertion by the defendant that the Crystal Lake Building Corporation, an Illinois corporation, was a necessary and indispensible party to the proceeding, that its interests were antagonistic to that of the defendant city and if made a party to the proceeding and properly aligned with plaintiff it would have the effect of defeating jurisdiction because there would then be no diversity.

To show the applicability of this contention it is necessary to refer briefly to the contract between the plaintiff and defendant of November 10, 1939. At that time, the Yeast Company being hard-pressed for a method of suitable disposition of its effluent, entered into a contract with the city whereby the city agreed to allow the Yeast Company to connect its disposal line to the storm sewer of the

city. It was agreed that the plaintiff would treat all waste emptied into such storm sewer so as to eliminate offensive odors and in a manner to meet the approval of the Sanitary Water-Board of the State of Illinois; that a shut-off valve would be installed to which the City would have free access for the purpose of shutting off such waste matter in the event of noncompliance and for other emergency reasons, such as a heavy rain storm or an overcharging of the capacity of the sewage system. All paragraphs and provisions of this contract relate to the covenants of the Yeast Company and the City of Crystal Lake with the single exception of paragraph 7. By paragraph 7, the Crystal Lake Building Corporation, at that time the holder of the legal title to the real estate upon which the Yeast Company's plant was situated, together with the Yeast Company, agreed to indemnify the City of Crystal Lake against any damages it might sustain by reason of any claims filed against the City growing out of the discharge of such effluent into the storm sewer of the City, and the Yeast Company and Building Company agreed not to further encumber their plant.

Paragraph 11 of the agreement provided that the agreement would expire in five years but was subject to renewal "providing conditions are satisfactory to both parties hereto at the expiration of this agreement."

The Crystal Lake Building Corporation is something of a figurehead in the entire transaction, being a wholly-owned subsidiary of the Yeast Company, organized for the single purpose of receiving title to the real estate upon which the Yeast Company contemplated the equipment of a plant for the operation of its business. Before the controversy arose between the Yeast Company and the City, and long prior to the institution of the proceedings herein, the Building Corporation had divested itself of such real estate by conveyance to the Yeast Company, and the Yeast Company had subsequently discharged all liens against the property. There of course remained as a barrier to the dissolution of the corporation, the Building Company's contingent liability under paragraph 7 of this contract

concerning any possible claims that might be filed against the City for causes of action arising prior to November 10, 1944. It is not contended that any such claims have ever been filed. Under these facts, the District Court declined to make the Building Corporation a party to the proceeding, and this question of jurisdiction is now before us for review for the first time.

The City contends that the Building Corporation was an indispensible party for the reason that its obligations under the contract were such that a final decree could not be made without affecting its interests, and that its interests being antagonistic to the City it would if brought in defeat jurisdiction, and cites *Shields* v. *Barrow*, 58 U. S. 130; *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, and numerous other decisions of lower courts.

The *Chase National Bank* case is a most interesting 5-4 decision in which jurisdiction was denied following a contrary holding by this Court. The facts are so different from our own case that its value here is doubtful except for the fundamental principles declared in the majority opinion. The Court there said:

> "As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record. Though variously expressed in the decisions, the governing principles are clear. To sustain diversity jurisdiction there must exist an 'actual' * * * 'substantial', * * * controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. * * * Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' * * * Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests' exists, is therefore not to be determined by mechanical rules. It must be ascer-

tained from the 'principal purpose of the suit', • • • and the 'primary and controlling matter in dispute.' • • •."

So here the question of whether the Building Corporation was a necessary party must be determined from "the realities of the record."

There can be no question but that the decree of the Court herein is ineffective to place any additional burden upon the Building Corporation. Its obligation under paragraph 7 of the agreement expired on November 10, 1944, and as asserted by the City it could successfully defend against any claim arising subsequent to that date. Its present contingent liability to respond in damages by reason of suits against the City for acts arising between November 10, 1939 and November 10, 1944 remains unaffected except by any appropriate statute of limitations. Its position seems to have been that of a guarantor or an indemnitor and thus was made a party to the agreement because at that time it held title to the Yeast Company property. This property has since been conveyed to the Yeast Company and the potency of the Building Company as an indemnitor has ceased to exist, but its contingent liability has not and cannot in the least be affected by the decree herein.

If it is conceded that the effect of the Court's decision herein is to award the plaintiff a renewal of such contract from November 10, 1944 to November 10, 1949 it can, of course, be effective only as between the Yeast Company and the City, but this would in no sense affect the interest of the Building Company. The question of whether the Yeast Company should have upon the entry of the decree herein furnished the City with further sureties for the faithful performance of its contract to indemnify the City for the period from November 10, 1944 to November 10, 1949, was a proper subject for consideration of the Court at the time of the decree herein if it had been presented. If the City in this renewal of its obligation to receive the effluent from the Yeast Company had believed that it was

entitled to be further indemnified other than by the obligation of the Yeast Company, we presume it could have so indicated to the trial court and the trial court would undoubtedly have had authority under its equity jurisdiction to have made the injunction order contingent upon the Yeast Company furnishing further security. The surety could have been any person or corporation qualified to act. The fact that the Building Company had for the preceding five years been the indemnitor can make no difference in this respect. A "collision of interests" between the City and the Building Corporation can only arise if and when the City is required to defend a suit for damages growing out of the subject matter of the contract, but there is no collision of interests in the relief sought in this proceeding. It is our judgment that the Building Corporation is neither a necessary nor an indispensible party in this suit and that the District Court correctly determined that it had jurisdiction.

As we have already noted when the case was before us on the former hearing, no evidence had been heard. We there stated:

> "Our conclusion is based on the showing at this early stage of the litigation. There is necessity for proof in support of the respective assertions to determine final disposition of the suit."

Upon remandment, the District Court referred the cause to a Special Master who, after extended hearings, found the facts and separately stated his conclusions of law.

Among other things, the Special Master found as follows:

> That, in the course of its research (for a method of elimination of odors from its effluent) the Plaintiff came upon a so-called "closed system", a new and more modern method of removing odor, consisting of two large closed concrete tanks, technically called anaerobic digesters; that the construction of such tanks and the apparatus used in connection therewith required a large quantity of steel and materials critical in the War effort.

That, unforeseeable by the parties thereto at the time of the execution of the Contract of November 10, 1939, between the Plaintiff and Defendant, the United States of America subsequently became engaged in wars with foreign enemies and restricted the use of critical materials, which prevented the Plaintiff from obtaining materials necessary for erecting and equipping a plant to eliminate odors from the effluent from its manufacture of yeast.

That the Plaintiff was prevented, wholly or in part, from completing its Contract with the Defendant prior to November 10, 1944, by the wars in which the United States of America was engaged and the restrictions upon the use of critical materials.

That the Defendant failed and refused to cooperate with the Plaintiff in its efforts to eliminate unpleasant odors from the effluent from its manufacture of yeast.

That the failure and refusal of the Defendant to cooperate with the Plaintiff in its efforts to obtain priority permits, hindered and prevented the Plaintiff from obtaining materials and authorization necessary for erecting and equipping a plant to eliminate odors from the effluent from its manufacture of yeast.

That the refusal on the part of the Defendant to cooperate with the Plaintiff in the latter's effort to eliminate unpleasant odors from the effluent from its manufacture of yeast, wholly or in part, prevented Plaintiff from completing its agreement with the Defendant prior to November 10, 1944.

That the Plaintiff has carried out and performed each term, provision and condition of the Contract with the Defendant, dated November 10, 1939.

That the Plaintiff has eliminated all unpleasant odor from the effluent arising from its manufacture of yeast.

That the Plaintiff, prior to the date upon which it filed its Complaint in the above entitled cause, was the sole owner of the properties in and near Crystal

Lake upon which the yeast involved in this case was manufactured and the effluent therefrom treated.

That, neither on the date when the Complaint in the above entitled cause was filed nor thereafter, did the Crystal Lake Building Corporation have any right, title or interest in or to the properties or any part thereof, in and near Crystal Lake in which yeast was manufactured by the Plaintiff and the effluent therefrom treated.

That the manufacture of yeast by the Plaintiff and disposal of the effluent therefrom is not now creating a public nuisance in the City of Crystal Lake.

These Findings of the Special Master were, on hearing, adopted by the District Court as the Findings and Conclusions of the Court. Upon examination of the record we find that such Findings of Fact have substantial support in the evidence and must be accepted. (Rule 52a of the Rules of Civil Procedure.)

The facts thus found were before us on the former appeal only as allegations appearing in the pleadings but have now on hearing of evidence been resolved by the lower Court adversely to defendant. All questions of law now presented and argued could have been presented on the former hearing, and most of them were except the jurisdictional question. The question of jurisdiction being a proper subject for consideration at any time we have herein considered and disposed of the contentions in relation thereto. In reference to the other principal points raised in the briefs and orally argued before the Court our views thereon found expression in our previous opinion written by our former associate, Judge Evans, and we find no occasion to modify or extend the views there expressed.

The decree is affirmed.

APPENDIX III.

Revised Statutes of Illinois Re Powers of City Council Over Use of Storm Sewers.

Section 1 of Article 23 of Cities and Villages Act (Illinois Revised Statutes, 1943, State Bar Association ed., p. 406):

> "The corporate authorities of a municipality shall have the powers enumerated in Sections 23—2 to 23—107, inclusive."

Section 35 of the same Article:

> "To construct, repair, and regulate the use of culverts, drains, sewers, and cesspools."

Section 36 of the same Article:

> "To regulate the construction, repair, and use of cesspools, cisterns, hydrants, pumps, culverts, drains, and sewers."

Section 7 of Article 60 of same Act:

> "The corporate authorities of any municipality that owns and operates or that may hereafter own and operate a sewerage system constructed or acquired under the provisions of any law of this State have the power to make, enact and enforce all needful rules and regulations in the construction, acquisition, improvement, extension, management, and maintenance of its sewerage system and for the use thereof."

Section 1 of said Article 60:

> "When used in this article the term 'sewerage system' means and includes * * * the disconnection of storm water drains and constructing outlets therefor * * *."